

SENATE BILL 94
REVISE CLOSED WATER BASIN PERMITTING LAWS
TESTIMONY OF JOHN TUBBS, DNRC

January 14, 2009

Mr. Chairman and Members of the Committee, thank you for the opportunity to appear and present testimony in support of this important legislation. My name is John Tubbs, and I am the Administrator of the Water Resources Division of the Department of Natural Resources and Conservation (Department or DNRC). My Division is charged with implementing the Montana Water Use Act, including water right permitting and change authorizations.

The changes reflected in this Bill are intended to provide more flexibility to tailor hydrogeologic analysis to the specific facts of each permit application. Each appropriation is highly fact specific. This Bill further reflects that the professionals preparing the analysis exercise professional judgment and should have the knowledge to understand the requirements to produce a net depletion analysis under the specific facts of individual proposed appropriations. This Bill is a compliment to Senate Bill 93. However, it is drafted as if Senate Bill 93 did not pass. Some minor reconciliation would need to be performed if both bills passed.

OVERVIEW:

- In 2007, the Legislature passed House Bill 831 to provide for ground water permitting in closed basins. HB 831 was passed in part to address the Montana Supreme Court's decision in Trout Unlimited et al. v. DNRC et al., which essentially closed many basins to the ground water exceptions in basin closures. The Trout Unlimited decision recognizes the interconnectivity of ground water and surface water, and that ground water appropriations can reduce, i.e. deplete, surface water flows by capturing water that would otherwise discharge to surface water sources.
- HB 831 set forth a very detailed description of the analysis to be provided in the hydrogeologic assessment to be submitted with an application for a ground water appropriation in a closed basin. §85-2-361, MCA.
- The Department fully supports the goals of HB831 to protect senior water right holders and yet provide a process to obtain a new ground water permit in a closed basin. However, the Department does not believe that the specific level of detail in the statute is required and statutory requirements constrain the Department's ability to adapt the analysis required to the specific facts of a proposed appropriation.
- This Bill reduces the detail and allows the Department the flexibility to adapt the required analysis to the facts of each proposed development while still being consistent with the Water Use Act.
- A reduction in the level of detail expressly required by statute will also reduce the possibility of technicalities being the basis for denial of permits (i.e. the hydrogeologic assessment fails to include something expressly required by statute

or to the level required by the statute, but nevertheless provides adequate analysis), which will, in turn reduce the risk of litigation to the applicant and the Department.

- The Department has seen very few HB 831 applications, and we are told that the reason is cost, risk, and the ease of using exempt wells as a source of drinking water for subdivisions. We believe that we can make the application process under these provisions more workable and yet provide the level of protection due senior water right holders.

PROPOSED AMENDMENTS TO 2007 HB 831 PROVISIONS:

The amendments to 2007 HB 831 provisions codified at §§85-2-360 through -370, MCA, are generally as follows.

Section 1:

- §85-2-321, MCA, is added to include the Milk River basin closure. This closure was mistakenly excluded.
- This amendment recognizes that an application may have both a mitigation plan and an aquifer recharge plan and is not limited to one or the other. Under the current statute, it is not clear that an applicant may use both to offset net depletion.
- Proposed non-consumptive use of ground water is excluded from the requirements for a hydrogeologic assessment. The Department is seeing an increase in applications for use of ground water through "heat pumps" for climate control in buildings. This is a non-consumptive use of ground water. Non-consumptive uses do not result in surface water depletion.
- Clarify that if you develop a well for the purpose of conducting hydrogeologic tests, the use of the well must cease until a water right is obtained. This amendment also makes the \$1000/day fine discretionary to have flexibility in addressing violations.
- Clarify that the Department and the applicant are not investigating the extent of historic beneficial use of water rights for the purpose of determining adverse effect caused by new appropriations. The Department reviews water rights as reflected in the records (water right claims, permits, etc.) of the Department's centralized database.

Section 2:

- Moves the requirement to have a qualified professional prepare the hydrogeologic assessment to earlier in the statute.
- The elements that Department professional hydrogeologists need in a hydrogeologic assessment associated with a ground water development to evaluate the application are listed. This begins to simplify and clarify the detail of section §85-2-361, MCA.

- The requirement to address water quality in the hydrogeologic assessment is moved to earlier in the statute.
- A long list of different surface water bodies is eliminated. HB 831 had various lists of surface water bodies for different purposes, sometimes including certain bodies (irrigation canals) and sometimes not. Example, §85-2-361(1)(a) versus -- 361(2)(a)(iv), MCA. These differing lists could lead to conflicting interpretations as to what must be considered. The section now includes "surface water within the potentially affected area."
- The amendment clarifies and simplifies the key elements an applicant needs to show in predicting net depletions: the diverted amount, the consumed amount and the amount returned to a source. Again, the purpose of the original language is maintained but the language is simplified.
- The amendment eliminates the reference to drainage subdivision boundaries. Rather than dictating an artificial surface area boundary in statute, the Department believes that the "qualified professional" should be allowed to define the extent of the influence of ground water development for the basis the hydrogeologic assessment. The current artificial boundary may not in all circumstances include the full potentially impacted area which needs to be analyzed for adverse effect to senior appropriators. This change eliminates potential misunderstandings and conflict between the Department, the applicant, and the objectors.
- The specific list of requirements for aquifer properties and aquifer boundaries is eliminated. The Department believes the "qualified professional" would have sufficient knowledge to develop a hydrogeologic assessment. These changes would simplify the statute and eliminate the potential for lawsuits over technical compliance with the statute in an application while maintaining the purpose of the provisions.
- This amendment clarifies what version of the hydrogeologic assessment is to be submitted to the Bureau of Mines and Geology for inclusion in the ground water database. The Department receives applications where the initial hydrogeologic assessment is in error, missing information. Through the deficiency letter process under the correct and complete determination in §85-2-302, MCA, as well as consultation with the applicant's "qualified professional" these errors are corrected. These changes clarify that it is the corrected hydrogeologic assessment as deemed by the Department to be "correct and complete" that is sent to the Bureau. A single, corrected hydrogeologic analysis would be submitted to the Department for submission to the Bureau, rather than sequential amendments to the originally submitted hydrogeologic assessment. Acceptance of a hydrogeologic assessment as correct and complete means that the applicant has addressed all of the requirements for an assessment not that the Department necessarily agrees with all of the analysis or conclusions.

Section 3:

- This amendment recognizes that an application may have both a mitigation plan and an aquifer recharge plan and is not limited to one or the other. Under the

current statute, it is not clear that an applicant may use both to offset net depletion.

- This amendment simplifies common requirements of both mitigation and aquifer recharge plans by eliminating the duplicate listing of common requirements. The amendments retain the unique water quality requirements needed for aquifer recharge plans in a separate sub-section.
- This amendment identifies proposals and actions that cannot be considered a "mitigation" plan. These exclusions mirror a Colorado statute excluding the elimination of vegetation to reduce consumptive use of water and the paving or covering of land with hard surfaces reducing consumptive use as components of a mitigation plan. Consideration of these plans as mitigation promotes the clearing of vegetation and paving of surfaces with at best marginal benefit to the resource. Paving does not increase the supply of tributary water to the resource. These types of plans are time consuming to analyze and are the subject of litigation.

Section 4:

- Amendments to this section make clear the original intent of HB 831 was that the "combined application" under §85-2-363, MCA, includes both the application for a beneficial water use permit and the application for a change to a water right as a single unit. One application cannot proceed without the other. The amendments make clear that a permit application cannot be granted unless the change application is granted and the reverse. Similarly, if one application fails to be correct and complete under §85-2-302, MCA, the other application will also be terminated. The combined application operates as a single unit because the applications for the permit and the change are interrelated. This process avoids having orphan applications granted without the companion application. An amendment also adds the opportunity for a show cause hearing before the Department before a combined application, where there are no objectors, is denied. The current statute allows for denial without an opportunity for hearing.
- The final amendment to this section adds the operative citation for changes in water rights §85-2-402, MCA, and strikes language that duplicates the Department's duties under §§85-2-311 and -402, MCA

Section 5:

- These amendments coordinate the acceptance of the beneficial water use permit application with the required discharge permits issued by the Department of Environmental Quality. However, rather than requiring the applicant to have already obtained the discharge permit from DEQ before applying to DNRC for a water right (a sequential process that delays the submission of the water right permit application and increases the overall time frame for the developer) the changes provide for a coordinated but parallel process that should protect water quality and reduce overall time frames.

Section 6:

- Reiterates that once aquifer testing is completed any use of the water shall cease.

Section 7:

- The amendments to this section recognize that in some circumstances a mitigation plan may require that an applicant leave flows instream or otherwise add water to a depleted reach where the applicant does not have a possessory interest in the surface water sources. Applications have been submitted to the Department where water is added to a source at a distance from a depleted reach to be mitigated. Current statutory constraints on possessory interest in the place of use, which may be a depleted reach of stream, makes authorization of mitigation plans difficult if not impossible in certain circumstances. The amendments likewise recognize that some mitigation plans may not requires a diversion, such as changing irrigation water rights to leave flows instream. These amendments address concerns with mitigation plans within and without a closed basin.

The Department fully supports this Bill and believes that it will improve the agency's service to the public. Thank you again for opportunity to comment on this legislation.